No. 7569

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

LAKE UNION DRY DOCK & MACHINE WORKS,
a corporation,

Appellant.

VS.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM A JUDGMENT
OF THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.
HON. JEREMIAH NETERER, *Judge.*

PETITION FOR REHEARING

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FRAYN PRINTING COMPANY

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PETITION FOR REHEARING

Comes now the appellant, Lake Union Dry Dock & Machine Works, a corporation, and respectfully petitions this Court for a rehearing in the above-entitled matter upon the ground that substantial errors have been made in the decision heretofore entered by this Honorable Court on the fourth day of November, 1935, to the manifest prejudice of appellant herein, said errors being as follows:

NO BURDEN ON APPELLANT TO SHOW DUE CARE

The substance of this Court's decision is that "the burden of showing due care rested upon the bailee" and that the appellant did not sustain this burden. We submit that in so holding this Court overlooked the principle that the law of the State wherein the contract to repair was made and performed should govern, and further that this Court erred in following a rule applicable only to that class of bailments known as "*locatio operis faciendi.*"

The record indicates that at the time of the fire the "Guard" was in appellant's yard in Seattle under a contract to repair, the latter having been executed in the same city. Consequently any controversy between the parties is governed by the law of the State of Washington.

Security Mortgage Co. v. Powers, 278 U. S. 149, 49 Sup. Ct. Rep. 84, 73 L. Ed. 236;

Mutual Life Insurance Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. Rep. 106, 45 L. Ed. 181;

Coghlan v. S. Carolina R. Co., 142 U. S. 101, 12 Sup. Ct. Rep. 150, 35 L. Ed. 951;

Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245;

Conner v. Elliott, 18 How. 591, 15 L. Ed. 497.

In support of its statement of the rule of law applied to this case, this Court cites several Federal cases (none of which involve the law of the State of Washington) and one decision of the Supreme Court of this State, namely, *McDonald v. Perkins,* 133 Wash. 622, 234 Pac. 456. The latter, however, clearly indicates that the

principle adopted by this Court is not the law of the State of Washington. On page 635, (Pacific Reporter, p. 461) the rule followed in this jurisdiction is stated as follows:

> " 'The ordinary rule established by numerous authorities is, that when the plaintiff has proved the deposit of his goods, and a failure of the defendant to produce the same on demand, he has established a *prima facie* case, and the defendant must excuse his failure to produce, by bringing himself within one of the recognized exceptions.' *Lockwood v. Manhattan Storage & Warehouse Co.*, 28 App. Div. 68, 50 N. Y. Supp. 954. The recognized exceptions are *loss of the goods by fire,* loss by theft, loss by leakage, or loss by the act of God." (Italics ours.)

The most recent Washington case on this point is *Birk v. City of Bremerton,* 137 Wash. 119, 241 Pac. 678, wherein it is said:

> "The law, with reference to the liability of warehousemen is well settled. A warehouseman is bound to exercise ordinary diligence only. *Colburn v. Wash. State Art Ass'n,* 80 Wash. 662, 141 Pac. 1153, L.R.A. 1915-A 594. When, however, it is shown that the loss is occasioned by larceny, burglary, *fire,* or other cause which of themselves do not point to negligence on the part of the bailee, the bailee has then met the *prima facie* case made against him by his failure to return the goods, and *the burden of proof as to negligence then rests upon*

the plaintiff as in any other case of alleged negligence." (Italics ours.)

Also see:

Colburn v. Wash. State Art Ass'n, 80 Wash. 662, 141 Pac. 1153, L.R.A. 1915-A 594;

Firestone Tire & Rubber Co. v. Pacific Trans. Co., 120 Wash. 665, 208 Pac. 55, 26 A.L.R. 217;

Harland v. Pe Ell State Bank, 122 Wash. 289, 210 Pac. 681.

There is nothing in any of these cases to indicate that the rule should only be applied "in the absence of circumstances permitting the inference of lack of reasonable precautions." In this jurisdiction the law is not thus qualified.

Moreover, the principle established by the Federal cases cited by this Court is inapplicable to the case at bar. Each of these decisions involved damages to a vessel *resulting from work done upon the boat itself.* The first case referred to concerned a loss occasioned by a faulty telegraph system just repaired by the defendant. The remaining three involved fire losses and in each instance the fire was shown to have originated *aboard ship at points where the respective defendants had been doing work.* As is pointed out in these cases, the bailments involved were those classed as *locatio operis faciendi*—there being work and labor to be performed on the thing delivered—and the Courts have held that under such circumstances the duty of explaining damage arising out of the performance of work is upon the party doing it.

The case at bar, however, does not present this situation. The fire did not originate on the vessel, but started in a boiler room on the wharf some distance away. The "Guard" would have been damaged even if she had been merely moored or stored in the yard; the repairs being made on her had nothing whatsoever to do with the loss. Consequently the case should be determined under the rules of law applicable to the ordinary warehouseman and the principles governing bailments *locatio operis faciendi* are inapplicable.

This distinction is pointed out by the Circuit Court of Appeals for the Fourth Circuit, in *Newport News Shipbuilding & Drydock Co. v. United States of America,* 34 Fed. (2d) 100 (the faulty telegraph system case) where it is said:

> "The cases cited in respondent's note — like *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 36 Sup. Ct. Rep. 469, 60 L. Ed. 836—are not, in my opinion, in point, for in all such cases the bailee was a mere custodian, whereas in the cases from which I have quoted, as in this case, the bailment was that known as *locatio operis faciendi.*"

We submit, therefore, that both the District Court and this Court erred in holding that the appellant was under the duty of showing the exercise of due care. We contend that when we established that the loss was due to fire, the burden of proving negligence rested upon the appellee.

APPELLEE FAILED IN DUTY TO MITIGATE DAMAGES

We respectfully point out that in affirming the lower Court, this Tribunal overlooked the rule of law re-

quiring a party to make a reasonable effort to mitigate or limit his damages. It is well settled that there can be no recovery for losses which might have been prevented by reasonable efforts on the part of the person injured.

Chesapeake & O. R. Co. v. Kelly, 244 U. S. 31, 37 S. Ct. Rep. 487, 61 L. Ed. 970;

United States v. United States Fidelity & Guaranty Co., 236 U. S. 512, 35 S. Ct. Rep. 298, 59 L. Ed. 696;

Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117;

The Baltimore, 8 Wall. 377, 19 L. Ed. 463;

United States v. Smith, 94 U. S. 214, 24 L. Ed. 115.

This Court points out in its decision that the dock supporting the "Guard" could easily have been cast loose from the wharf, and that the wind would have carried it out of the reach of the flames. It appears, however, that the two men stationed on the "Guard" did not resort to this obvious and simple method of protecting their boat, but rather that they devoted fifteen or twenty minutes to a fruitless attempt to extinguish the fire on the wharf and in saving their dinghy.

Their effort to fight the blaze was obviously a waste of time, in view of the fact that when they arrived on the scene it filled the interior of the boiler room, and had broken through the sides and roof. At that time flames were jumping twenty feet into the air. (Tr. p.

42.) Even when they saw the futility of this work and realized the danger to the "Guard" (Tr. p. 44) they decided to first attempt to save the dinghy. The latter was in the yard under the same circumstances as was the larger vessel, and the duties of the appellant as to protection were the same in each instance. Notwithstanding this, however, valuable time was wasted in saving the dinghy, while the "Guard," a large and expensive boat, was left exposed and in close proximity to the fire.

The crew of the "Guard" was under a legal duty to make a reasonable effort to minimize appellee's loss, yet they deliberately delayed in casting the dock adrift until they had saved the dinghy, a small rowboat of comparatively little value. In the meantime the "Guard," worth probably a thousand times as much as the latter, was damaged to the extent of $3362.00. Certainly the crew did not act as reasonable men would have acted under the same or similar circumstances.

We contend, therefore, that it is evident that appellee's loss could have been entirely prevented had its men performed their legal duty, and that consequently appellant cannot be held responsible for the damage resulting from a breach of that duty.

Wherefore, it is respectfully submitted that the decision of the lower Court should have been reversed, and appellant respectfully prays that this petition for a rehearing herein be granted, that the decision of this Court entered on the 4th day of November, 1935, be

set aside, and that a mandate be returned to the lower Court directing the reversal of the decree of said lower Court.

Respectfully,

RAYMOND G. WRIGHT,
H. B. JONES,
ROBERT E. BRONSON,
STORY BIRDSEYE,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the attorneys for the appellant in the above entitled proceeding; that I have prepared on behalf of appellant this petition for rehearing; that in my judgment said petition is well founded, and that it is not interposed for the purpose of delay in any respect.

STORY BIRDSEYE.